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Denying Sovereignty: The Louisiana Supreme Court's Rejection of the Tribal Exhaustion Doctrine

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INTRODUCTION

In its recent decision in *Meyer & Associates, Inc. v. Coushatta Tribe of Louisiana*, the Louisiana Supreme Court declined to require the application of the Tribal Exhaustion Doctrine (the "Doctrine") in Louisiana state district courts.[1] The Doctrine is a federal jurisprudential rule that applies when a tribal court has a claim of jurisdiction over a dispute.[2] It requires federal courts to abstain from hearing the case until the tribal court has determined whether it can properly retain jurisdiction over the matter.[3] The effect of this ruling by the Louisiana Supreme Court is that tribal courts will be denied the ability, in many instances, to determine questions related to tribal sovereign immunity. The United States Supreme Court has not yet had the occasion to determine whether the Doctrine is required of state courts, and several states have reached different conclusions as to whether their courts will be required to apply the Doctrine.[4] Upon further examination of federal common law, as well as strong prudential considerations in favor of the Doctrine's application, it becomes apparent that the Louisiana Supreme Court erred in declining to apply the Doctrine to Louisiana state district courts.

This Note will analyze the Louisiana Supreme Court's decision not to follow the Tribal Exhaustion Doctrine in *Meyer*. The first part of this Note will recount the history of the Tribal Exhaustion Doctrine and its status in both federal and state courts. The second part will discuss the decision in *Meyer* and will summarize the analysis of both the majority and dissenting opinions. The third part will discuss the Louisiana Supreme Court's duty, under the Supremacy Clause of the U.S. Constitution, to apply the Doctrine to Louisiana courts.[5] The fourth part will argue that, in addition to the Louisiana Supreme Court's obligation under the Supremacy Clause, a careful consideration of prudential factors, as well as state and federal policies in favor of tribal sovereignty and self-determination, should have led the court to require that lower Louisiana state courts apply the Tribal Exhaustion Doctrine to disputes like *Meyer*.

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1. Meyer & Assocs., Inc. v. Coushatta Tribe of La., 992 So. 2d 446, 452 (La. 2008), *cert. denied*, 129 S. Ct. 1908 (2009).
2. Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856 (1985).
3. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 15 (1987).
4. *See* discussion *infra* Part I.B.
5. U.S. CONST. art. VI.

I. THE TRIBAL EXHAUSTION DOCTRINE

A. The Doctrine in General

Native American tribes are characterized by the United States Supreme Court as being "domestic dependent nations."[6] They are "distinct political communities, having territorial boundaries, within which their authority is exclusive."[7] In recognition of its responsibility to these domestic dependent nations, Congress has made efforts to ensure that tribal sovereignty is both maintained and respected.[8] Tribal courts play an important role in sustaining tribal sovereignty, and the federal government took steps to ensure their development.[9] Native American tribes retain the ability to govern their lands and tribe members, provided that there is no federal statute or treaty restricting the exercise of that authority.[10] Necessarily, then, Native American tribes and their courts "occupy a unique status under our law."[11] Because of this unique position, tribes often find themselves caught in a power struggle between tribal, federal, and state governments.[12]

In response to problems that the tribes' unique legal status poses, federal courts inventively created a set of jurisdictional rules to apply in disputes involving both members and non-members of a tribe. One such rule is the "Tribal Exhaustion" or the "Exhaustion of Tribal Remedies" Doctrine, which was first announced by the U.S. Supreme Court in *National Farmers Union v. Crow Tribe of Indians*.[13] The Doctrine requires that, in situations where a tribal court has a claim of jurisdiction that has been challenged, the tribal court will be the first institution with the opportunity to evaluate the basis upon which the challenge has been made.[14] Thus, the Doctrine requires that federal courts stay

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6. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).
7. Worchester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832).
8. *See Iowa*, 480 U.S. at 14.
9. *Id.*
10. *Id.*
11. Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 851 (1985).
12. Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts (Part I of II)*, 46 AM. J. COMP. L. 287, 293 (1998).
13. 471 U.S. 845.
14. *See id.* at 856; *see also* Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth., 207 F.3d 21, 31 (1st Cir. 2000) ("[W]hen a colorable claim of tribal court jurisdiction has been asserted, a federal court may (and ordinarily should) give the tribal court precedence and afford it a full and fair opportunity to determine the extent of its own jurisdiction . . . .").

their proceedings until the tribal courts initially resolve questions of jurisdiction.

In *National*, as well as its companion case, *Iowa Mutual Insurance Co. v. LaPlante*,[15] the U.S. Supreme Court characterized the Doctrine as one encompassing the federal government's desire to support tribal self-government by recognizing that a federal court's exercise of jurisdiction over disputes involving a tribe or its members weakens the authority of tribal courts.[16] The Doctrine promotes the orderly administration of justice because it protects against "procedural nightmares"[17] and allows other courts to benefit from tribal courts' expertise in the event that a party appeals the decision.[18]

The U.S. Supreme Court has gone as far as to say that the application of the Doctrine is "required" as a matter of comity.[19] As defined previously by the Court, comity "is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws."[20] Given this language, it appears that, when Exhaustion is applicable, the Court's policy is to treat tribes as if they are sovereign nations.

Nonetheless, the Doctrine's application is limited. Specifically, in *National*, the Court provided three potential scenarios in which exhaustion would not be required: where the assertion of jurisdiction by the tribal court has been made in bad faith or was motivated out of a desire to harass a party; where such an assertion would violate express jurisdictional provisions; or where the application would result in a party being denied an opportunity to challenge the jurisdictional decision.[21] If none of these exceptions are implicated, federal courts must adhere to the Doctrine in civil cases.

This does not, of course, mean that a litigant whose state court claim has been removed to the tribal court for a determination of jurisdiction is without recourse. Once the tribal court determines whether it has jurisdiction, the litigant will be able to seek review in the federal courts. This federal court review will likely come

15. 480 U.S. 9.
16. *Id.* at 18.
17. *National*, 471 U.S. at 856–57.
18. *Id.* at 857.
19. *Iowa*, 480 U.S. at 16 n.8.
20. Hilton v. Guyot, 159 U.S. 113, 163–64 (1895).
21. *National*, 471 U.S. at 856 n.21.

after a tribal appeals court has upheld a lower tribal court's decision on the question of jurisdiction.[22]

B. The Tribal Exhaustion Doctrine in State Courts

Although there is no question that the Tribal Exhaustion Doctrine applies to federal courts, the U.S. Supreme Court has not explicitly stated whether the Doctrine equally applies to state courts.[23] As a result, states may reach different conclusions on the matter.[24] The Connecticut Supreme Court in *Drumm v. Brown* held that its state courts are bound by the Doctrine.[25] In *Drumm*, the Connecticut Supreme Court acknowledged the possibility that the Doctrine is actually an interstitial rule of federal common law[26] that likely binds state courts under the Supremacy Clause of the U.S. Constitution.[27] Regardless of this possibility, the Connecticut Supreme Court ultimately held that policy considerations compelled them to require the Doctrine's application.[28] On a similar note, the Wisconsin[29] and New York[30] high courts recognize the Doctrine, while courts in Arizona,[31] Minnesota,[32]

22. *Iowa*, 480 U.S. at 19.

23. Meyer & Assocs., Inc. v. Coushatta Tribe of La., 992 So. 2d 446, 450 (La. 2008), *cert. denied*, 129 S. Ct. 1908 (2009).

24. Of course, guidance from the U.S. Supreme Court may not be necessary. *See* discussion *infra* Part III.

25. 716 A.2d 50 (Conn. 1998).

26. Interstitial rules are gap-filling mechanisms created by federal courts. They have the same force and effect as federal statutes and are binding under the Supremacy Clause of the U.S. Constitution. *See* discussion *infra* Part III.A.

27. *Drumm*, 716 A.2d at 62–63.

28. *Id.* at 63.

29. *See generally* Bryan Cahill, Teague v. Bad River Band of Lake Superior Tribe of Chippewa Indians*: Bringing the Federal Exhaustion Rule of Tribal Remedies Home to Wisconsin Courts*, 2004 WIS. L. REV. 1291.

30. Seneca v. Seneca, 741 N.Y.S.2d 375, 379 (N.Y. App. Div. 2002). In *Seneca*, the New York appellate court declined to apply the Doctrine because there was not a concurrent action pending in tribal court. The court did indicate, however, that were there a similar action pending, they may be required to apply the Doctrine as a matter of federal common law, as discussed in *Drumm*. *See supra* notes 25–28 and accompanying text.

31. Astorga v. Wing, 118 P.3d 1103, 1106 (Ariz. Ct. App. 2005). The Arizona Supreme Court made this determination because of the fact that federal courts have the ability to review these determinations, whereas state courts do not.

32. Gayle v. Little Six, Inc., 555 N.W.2d 284, 292 (Minn. 1996). The Minnesota Supreme Court held that a state court's determination of whether tribal sovereign immunity had been waived would not act as an infringement on tribal sovereign immunity.

Oklahoma,[33] and Washington[34] do not require application of the Doctrine in their courts.

In summary, the Tribal Exhaustion Doctrine requires that a tribal court have the first chance to determine whether it has jurisdiction over a case.[35] Although the Doctrine unquestionably applies to federal courts, the U.S. Supreme Court has not had occasion to apply this Doctrine to state courts.[36] Due to this lack of guidance, many states have reached opposing conclusions on the question of whether they are required to apply the Doctrine. It was this question, in particular, that the Louisiana Supreme Court faced in *Meyer*.

II. *MEYER & ASSOCIATES, INC. V. COUSHATTA TRIBE OF LOUISIANA*: THE LOUISIANA SUPREME COURT'S DECISION

In December 2001, the Coushatta Tribe of Louisiana (the "Tribe") entered into a contract with Meyer and Associates, Inc. for general engineering and construction services.[37] The contract contained a clause stating that it would be governed by the laws of the State of Louisiana.[38] It further provided that, in the event of a dispute between the parties, the dispute would be settled by binding arbitration according to the American Arbitration Association.[39]

The two parties then decided that they would enter into a joint venture to develop a power plant on reservation property.[40] The tribal council issued a resolution authorizing the Chairman of the Tribe, Lovelin Poncho, to negotiate and execute agreements on behalf of the Tribe that would be necessary to the furtherance of the joint venture.[41] Pursuant to this grant, Chairman Poncho entered into a Supplemental Agreement with Meyer on behalf of the Tribe.[42] The Supplemental Agreement contained a provision

33. Michael Minnis & Assocs., P.C. v. Kaw Nation, 90 P.3d 1009, 1014 (Okla. Civ. App. 2003). An Oklahoma appellate court determined that the Tribe had waived its sovereign immunity and that, much like in *Meyer*, exhaustion did not apply.

34. Maxa v. Yakima Petroleum, Inc., 924 P.2d 372 (Wash. Ct. App. 1996).

35. Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856 (1985).

36. Meyer & Assocs., Inc. v. Coushatta Tribe of La., 992 So. 2d 446, 450 (La. 2008), *cert. denied*, 129 S. Ct. 1908 (2009).

37. *Id.* at 448.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

stating that any disputes between the parties would be subject to courts "in the Parish of Allen, or any other Parish mutually agreed to" and that the Tribe had "specifically waive[d] any rights, claims or defenses to sovereign immunity it may have."[43] This agreement and purported waiver of sovereign immunity were never directly authorized by the tribal council.[44] Additionally, the Tribe executed several memorandums of understanding with various other parties to the venture, each containing a similar forum selection clause.[45]

Ultimately, a dispute arose, and on April 21, 2006, the Tribe filed suit in tribal court against Meyer for damages related to the various contracts.[46] Subsequently, on June 9, 2006, Meyer filed suit in state district court against the Tribe.[47] The Tribe filed an exception for lack of subject matter jurisdiction on the basis of the Tribe's sovereign immunity, which the state district court denied.[48] On August 8, 2006, the Louisiana Third Circuit Court of Appeal applied the Tribal Exhaustion Doctrine and stayed the proceedings pending a resolution of the jurisdictional question in the tribal court.[49] The third circuit's opinion effectively reversed the trial court's decision to deny the exception.[50] Meyer applied for certiorari, which the Louisiana Supreme Court subsequently granted.

The Louisiana Supreme Court dealt with two issues in the case. The first was largely procedural, where the court sought to determine whether the state district court should have applied the Exhaustion of Tribal Remedies Doctrine, which would provide the tribal court with the opportunity to determine whether the Tribe had waived its sovereign immunity.[51] The second issue was substantive in nature, as the court sought to determine whether the Tribe had waived its sovereign immunity, thereby subjecting itself to the jurisdiction of the state district court.[52]

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43. *Id.*
44. Petition for a Writ of Certiorari, *Meyer*, 992 So. 2d 446 (No. 08-985), 2009 WL 273312.
45. *Meyer*, 992 So. 2d at 448.
46. *Id.* at 448–49.
47. *Id.* at 449.
48. Petition for a Writ of Certiorari, *supra* note 44.
49. *Meyer*, 992 So. 2d at 449.
50. *Id.*
51. *Id.*
52. *Id.*

A. The Louisiana Supreme Court's Discussion of the Doctrine and Its Application

The majority opinion recognized the existence of the Tribal Exhaustion Doctrine and stated that its purpose is "to allow self-government and self-determination by [Native American] tribes of which tribal courts play an important role."[53] The court also stated that the rule is merely a prudential one that is applied only as a matter of comity.[54] The majority argued, however, that it was not required to follow the Doctrine because the U.S. Supreme Court has never explicitly required that state courts apply the Doctrine.[55] It then disapprovingly characterized the effects of the Doctrine, essentially stating that the Doctrine requires a court with jurisdiction to turn over the case to a court that may or may not have jurisdiction in order to answer that very question.[56] The majority, asserting that "state courts are the arbiters of their own jurisdiction," held that the district court was correct in entertaining the issue of whether it retained subject matter jurisdiction.[57]

Turning to the facts of the case before it, the majority cited to *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*[58] for the rule that Native American tribes are only subject to suit in nontribal courts where Congress has specifically authorized the suit or if the tribe has waived its immunity.[59] In order to decide whether the Tribe had waived its sovereign immunity, the majority took it upon itself to interpret section 1.1.05 of the Coushatta Tribal Code to determine whether the tribal council's grant of authority to Chairman Poncho gave him the authority to waive the Tribe's immunity.[60] The majority claimed that the language of section 1.1.05 was clear and should be given its plain meaning and concluded that, under Coushatta's tribal law, Chairman Poncho waived the Tribe's sovereign immunity.[61] Therefore, the court held, the state district court correctly denied the Tribe's exception for lack of subject matter jurisdiction, and the Tribe was subject to the jurisdiction of the Louisiana state courts.[62]

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53. *Id.*
54. *Id.*
55. *Id.* at 450.
56. *Id.*
57. *Id.*
58. 523 U.S. 751 (1998).
59. *Id.* at 754.
60. *Meyer*, 992 So. 2d at 450–51.
61. *Id.* at 451.
62. *Id.* at 451–52.

B. Justice Kimball's Dissent

Justice Kimball argued that the tribal court should have been allowed to determine its own jurisdiction by answering the question of whether the Tribe had waived its sovereign immunity.[63] To illustrate the point that the tribal court had a colorable claim of jurisdiction, Justice Kimball cited *Montana v. United States*.[64] In *Montana*, the U.S. Supreme Court held that when non-members enter into consensual, commercial relationships with Native American Tribes, the Tribes retain the authority to govern the actions of these non-members.[65] She then applied the three limitations on the Doctrine's application found in *National*[66] and concluded that they were not implicated in this case.[67] Ultimately, Justice Kimball argued that, because the tribal court could have had jurisdiction and because none of the *National* limitations applied, the Tribal court was the proper venue for the preliminary question of whether the tribal court's jurisdiction had been waived.[68]

Justice Kimball countered the majority's assertion that the Doctrine does not apply because it is merely "an optional matter of comity."[69] She noted that the U.S. Supreme Court has never stated that the Doctrine is discretionary and that the existence of three exceptions to the Doctrine, as well as the Court's refusal to expand

63. *Id.* at 453 (Kimball, J., dissenting).
64. 450 U.S. 544 (1981).
65. *Id.* at 565–66; *see Meyer*, 992 So. 2d at 455 (Kimball, J., dissenting).
66. *See supra* note 21 and accompanying text.
67. *Meyer*, 992 So. 2d at 456–57 (Kimball, J., dissenting).
68. *Id.* at 456.
69. *Id.* at 457. Chief Justice Calogero concurred with the majority's decision. *Id.* at 452 (Calogero, C.J., concurring). He argued that, because the U.S. Supreme Court did not mention the Tribal Exhaustion Doctrine in its decision in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998)—a case involving a tribal court being sued in state court—the Court has implicitly indicated that the doctrine does not apply to state courts. *Meyer*, 992 So. 2d at 452 (Calogero, C.J., concurring). However, it should be noted that the Tribal Exhaustion Doctrine was not an issue before the Court in *Kiowa*. No mention of the Doctrine was made in the petition for certiorari, Petition for a Writ of Certiorari, *Kiowa*, 523 U.S. 751 (No. 96-1037), 1996 WL 33414086; the brief in opposition, Respondent's Brief in Opposition, *Kiowa*, 523 U.S. 751 (No. 96-1037), 1997 WL 33484618; or in either party's appellate brief, Brief for Petitioner, *Kiowa*, 523 U.S. 751 (No. 96-1037), 1997 WL 523863; Brief for Respondent, *Kiowa*, 523 U.S. 751 (No. 96-1037), 1997 WL 597299; Reply Brief for Petitioner, *Kiowa*, 523 U.S. 751 (No. 96-1037), 1997 WL 668161. Additionally, neither party mentioned the Doctrine in oral argument. Transcript of Oral Argument, *Kiowa*, 523 U.S. 751 (No. 96-1037), 1998 WL 15116. Thus, neither party attempted to litigate the issue on those grounds.

those exceptions,[70] indicates its application is mandatory.[71] Citing the rationale used by the Supreme Court in *National* and *Iowa* where the Doctrine was first created,[72] she argued that, by taking it upon itself to interpret a provision of tribal law, the state court unjustifiably interfered with the tribal court's ability to interpret its own Tribal Code.[73]

Justice Kimball went on to discuss the fact that the Connecticut Supreme Court, in *Drumm*,[74] had already concluded that the Doctrine applies in Connecticut state courts.[75] *Drumm* reasoned that the Tribal Exhaustion Doctrine is an interstitial rule and that, as part of federal common law, state courts must abide by the Doctrine's requirements.[76] Although she raised this as a possibility, Justice Kimball ultimately rested her argument on the prudential concerns in favor of tribal sovereignty and that self-determination should compel the court to adopt the Doctrine.[77] She concluded that the majority was incorrect in deciding not to apply the Doctrine.[78]

III. THE LOUISIANA SUPREME COURT WAS REQUIRED TO APPLY THE TRIBAL EXHAUSTION DOCTRINE

The U.S. Supreme Court has not yet had the occasion to explicitly consider whether state courts are required to apply the Tribal Exhaustion Doctrine. The majority in *Meyer* cited this lack of direct input as a reason for not requiring the Doctrine in Louisiana state courts.[79] However, the court in *Meyer* erred by failing to consider whether the Tribal Exhaustion Doctrine is an interstitial rule of federal common law that courts are required, under the Supremacy Clause of the U.S. Constitution, to follow.

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70. In *Iowa*, the Court refused to expand the limitations on the Doctrine that were set out in *National*. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 19 (1987) ("The alleged incompetence of tribal courts is not among the exceptions to the exhaustion requirement established in [*National*], and would be contrary to the congressional policy promoting the development of tribal courts." (footnote and citation omitted)).

71. *Meyer*, 992 So. 2d at 458 (Kimball, J., dissenting).

72. *Id.* at 459–60.

73. *Id.* at 461.

74. Drumm v. Brown, 716 A.2d 50, 63 (Conn. 1998).

75. *Meyer*, 992 So. 2d at 461 (Kimball, J., dissenting) (citing *Drumm*, 716 A.2d at 50).

76. *Id.* (citing *Drumm*, 716 A.2d at 62–63).

77. *Id.* at 461–62.

78. *Id.*

79. *Id.* at 450.

A. Federal Common Law and Interstitial Rules: A Primer

The Supremacy Clause, found in Article VI of the U.S. Constitution, provides that "the Laws of the United States . . . shall be the Supreme Law of the land; and the Judges in every State shall be bound thereby."[80] State courts are bound to adhere to federal law where it exists. What the majority in *Meyer* failed to recognize was that "federal law" includes more than just statutes passed by Congress and the rules and regulations enacted by federal administrative agencies. Federal law also includes federal common law, which federal courts may create in certain circumstances.[81] This body of federal common law is, like all other sources of federal law, binding upon the states via the Supremacy Clause.[82]

Federal common law is the body of judge-made law that previously had been applied in diversity of citizenship cases.[83] As Justice Brandeis emphatically stated in his majority opinion in *Erie Railroad Co. v. Tompkins*, there is "no federal general common law."[84] The result in *Erie* was such that federal courts are required to employ the substantive law of the state in which the court sits.[85] However, the *Erie* rule is not absolute. Although there is no federal "general" common law, federal common law *does* exist. This is illustrated by *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, another opinion authored by Justice Brandeis, in which the Court applied federal common law to decide a dispute between two states regarding water rights.[86]

Federal common law may be created through the use of interstitial rules. Federal courts use interstitial rules to fill in gaps that exist in bodies of federal legislation.[87] The need to create these rules flows from "the inevitable incompleteness presented by the

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80. U.S. CONST. art. VI.

81. Henry Friendly, *In Praise of* Erie*—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405 (1964). In a seminal work discussing the effects of the *Erie* doctrine, Judge Friendly discusses the fact that, although *Erie* shut the door on general federal common law, the possibility for specialized federal common law still exists.

82. Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 897 (1986).

83. BLACK'S LAW DICTIONARY 313 (9th ed. 2009).

84. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 77 (1938).

85. *Id.* at 78.

86. 304 U.S. 92, 110 (1938).

87. 19 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4516 (West, Westlaw through 2010 Update).

enactment of complex and comprehensive legislation."[88] In order to properly enforce the statutory schemes enacted by Congress, federal courts are required to fill the gaps that Congress may have overlooked.[89] The existence of this authority comes from a practical recognition that there is futility in attempting to pass legislation that will wholly and completely govern an area of the law.[90]

Federal courts are apt to create interstitial rules in areas that are of particular interest to the federal government.[91] Whether the courts actually have authority to create these rules remains a question of federal congressional intent.[92] Some authorities contend that the requisite intent may be gleaned from an implicit delegation by Congress of lawmaking authority to federal courts.[93] In addition to the need for Congressional intent, there must also be an actual gap in which Congress has failed to legislate.[94] It is only then that federal courts may fill the gap according to their own standards.[95] In sum, a court has the ability to create these interstitial rules in heavily federalized areas of the law, where Congress has intended to grant lawmaking authority to federal courts and an actual gap in legislation exists.

B. The Tribal Exhaustion Doctrine as an Interstitial Rule

In its decision in *Drumm*, the Connecticut Supreme Court discussed the possibility that the Tribal Exhaustion Doctrine is an interstitial rule and that state courts are bound to follow it.[96] Justice Kimball's dissent in *Meyer* also discussed this possibility. But neither Justice Kimball nor the Connecticut Supreme Court in *Drumm* rested its analysis on this, as both ultimately felt that mere prudential concerns were strong enough to compel the Doctrine's application.[97] Resting on prudential concerns is simply not necessary. The Tribal Exhaustion Doctrine *is* an interstitial rule of federal common law. As an interstitial rule of federal common law,

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88. Coop. Benefit Adm'rs, Inc. v. Ogden, 265 F. Supp. 2d 662, 671 (M.D. La. 2003), *rev'd on other grounds*, 367 F.3d 323 (5th Cir. 2003).

89. United States v. Little Lake Misere Land Co., 412 U.S. 580, 593 (1973).

90. D'Oench, Dume & Co. v. FDIC, 315 U.S. 447, 470 (1948) (Jackson, J., concurring).

91. Sosa v. Alvarez-Machain, 542 U.S. 692, 726 (2004).

92. 19 WRIGHT ET AL., *supra* note 87, § 4516.

93. *Id.*

94. Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943).

95. *Id.*

96. Drumm v. Brown, 716 A.2d 50, 63 (Conn. 1998).

97. *Id.*; Meyer & Assocs., Inc. v. Coushatta Tribe of La., 992 So. 2d 446, 461 (La. 2008) (Kimball, J., dissenting), *cert. denied*, 129 S. Ct. 1908 (2009).

the Doctrine, and its application in state courts, is mandated by the Supremacy Clause of the U.S. Constitution.

The first essential element for the creation and application of these interstitial rules is that there be a heavily federalized area that is of particular interest to the federal government.[98] In matters concerning Native Americans, there is a considerable amount of federal authority over the tribes.[99] The federal government has hardly under-utilized this grant of authority, and many aspects of Native American life are governed by federal legislation.[100] As discussed in both *National* and *Iowa*, there is a strong interest in the promotion of tribal sovereignty and self-determination.[101] Therefore, it would appear that the Tribal Exhaustion Doctrine, as a vehicle for the promotion of tribal sovereignty and self-determination, fits within this statutory scheme and acts to promote Congress's policies regarding Native Americans.

There must also be an intent, implied or otherwise, by Congress to delegate lawmaking authority respecting Native Americans to federal courts.[102] This intent is evidenced by the fact that the U.S. Supreme Court has already applied federal common law to decisions involving Native Americans. In *Oneida County v. Oneida Indian Nation of New York State*, the U.S. Supreme Court noted that several of the Court's past decisions have used federal common law to uphold Native Americans' indigenous land

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98. *See* discussion *supra* Part III.A.

99. United States v. Wheeler, 435 U.S. 313, 319 (1978) ("Congress has plenary authority to legislate for the Indian tribes in all matters, including their form of government.").

100. Some examples of federal legislation include: The Adult Indian Vocational Training Act, 25 U.S.C. § 309 (2006); The Indian Self-Determination and Education Assistance Act (ISDEAA), 25 U.S.C. §§ 450–458 (2006 & Supp. 2009); The Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301–1341 (2006); The Indian Financing Act of 1974, 25 U.S.C. §§ 1451–1544 (2006); The Indian Health Care Improvement Act, 25 U.S.C §§ 1601–1683 (2006 & Supp. 2009); The Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901–1963 (2006); The Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. §§ 3001–3013 (2006); The American Indian Agricultural Resource Management Act, 25 U.S.C. §§ 3701–3746 (2006); The American Indian Religious Freedom Act (AIRFA), 42 U.S.C. § 1996 (2006).

101. Richard M. Nixon, Message from the President of the United States Transmitting Recommendations for Indian Policy (July 8, 1970), *reprinted in* DAVID H. GETCHES & CHARLES F. WILKINSON, FEDERAL INDIAN LAW: CASES AND MATERIALS 151–53 (2d ed. 1986). This is a printed reproduction of President Nixon's message to Congress that served as a "catalyst" for federal regulations regarding Native Americans. In the letter, President Nixon urged that Congress "make it clear that the Indians can become Independent of Federal control without being cut off from Federal concern and Federal support." *Id.*

102. *See supra* note 92 and accompanying text.

rights.[103] Congress has not sought to limit this judicially created right through statute and, therefore, this can be taken as an implicit acceptance of the Court's actions. On a similar note, the Tribal Exhaustion Doctrine has remained undisturbed by federal legislation for over 20 years. This, too, may serve as an implicit approval of the Court's decision and further acceptance of the Court's ability to create interstitial rules as part of federal common law.

Lastly, for the Doctrine to function as an interstitial rule, there must also be an actual gap in which Congress has failed to legislate. Currently, there is no federal statute that explicitly governs how courts are to proceed when tribal courts and state or federal district courts have colorable claims of jurisdiction over a dispute. Given the sheer number of federal statutes passed by Congress that govern the lives of Native Americans,[104] and the fact that Congress has not provided explicit guidance on these jurisdictional questions, it is clear that there is a gap that the Doctrine can easily fill. The Tribal Exhaustion Doctrine, therefore, meets all of the requirements for being an interstitial rule as part of federal common law. This is because there is a heavily federalized area of the law, implicit intent by the U.S. Congress to delegate this law making authority to federal courts, and a gap that exists between statutes governing Native Americans.

Although the Supreme Court did not explicitly state that it was creating an interstitial rule, the language used in *National* and *Iowa* indicates a desire to apply the Doctrine in all situations, save for a few exceptions.[105] In *National*, the Court laid out several factors that must be weighed before a determination of tribal court jurisdiction can be made[106] and further stated that tribal courts should be given the first opportunity to examine them.[107] On this same note, in *Iowa*, the Court also stated that the promotion of tribal self-government requires that tribal courts have the first

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103. Oneida Cnty. v. Oneida Indian Nation of N.Y. State, 470 U.S. 226, 234–35 (1985).

104. *See supra* note 97 and accompanying text.

105. *See supra* note 21 and accompanying text.

106. Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 855–56 (1985) ("[T]he answer to the question whether a tribal court has the power to exercise civil subject-matter jurisdiction over non-Indians in a case of this kind is not automatically foreclosed . . . . Rather, the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions. We believe that examination should be conducted in the first instance in the [t]ribal [c]ourt itself." (footnote omitted)).

107. *Id.* at 856.

opportunity to evaluate the factual and legal bases for a challenge to tribal court jurisdiction.[108] And, as noted by the Connecticut Supreme Court in *Drumm*, the Court's statement in *Iowa* that "[a]djudication of such matters by *any* nontribal court . . . infringes upon tribal lawmaking authority" is indicative of a desire for the rule to apply beyond the bounds of the federal court system.[109] The U.S Supreme Court further held that the adjudication of questions of jurisdiction by nontribal courts would be an infringement upon tribal authority because tribal courts are the most qualified to interpret tribal law.[110] The Court has even indicated that the Doctrine's application is "required" as a matter of comity.[111] In its only mention of state court authority in either *National* or *Iowa*, the Court stated that "[t]he federal policy favoring tribal self-government operates even in areas where state control has not been affirmatively pre-empted by federal statute."[112] These considerations, coupled with the fact that the Doctrine clearly meets the requirements for being an interstitial rule, show that the Louisiana Supreme Court's decision in *Meyer* is erroneous and is in violation of the court's obligations under the Supremacy Clause of the U.S. Constitution.

IV. PRUDENTIAL CONCERNS IN FAVOR OF TRIBAL SOVEREIGNTY AND SELF-DETERMINATION SHOULD HAVE PERSUADED THE LOUISIANA SUPREME COURT TO ADOPT THE TRIBAL EXHAUSTION DOCTRINE IN LOUISIANA'S STATE COURTS

In its decision in *Meyer*, the Louisiana Supreme Court declined to apply the Tribal Exhaustion Doctrine in Louisiana's district courts because it concluded that the Tribal Exhaustion Doctrine is a prudential rule and, thus, discretionary.[113] For the reasons set forth above, this was erroneous. Even if the Doctrine were discretionary, however, consideration of prudential factors

108. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 16 (1987).

109. Drumm v. Brown, 716 A.2d 50, 63 (Conn. 1998) (emphasis added) (quoting *Iowa*, 480 U.S. at 16).

110. *Iowa*, 480 U.S. at 16.

111. *Id.* at 16 n.8.

112. *Id.* at 14.

113. Meyer & Assocs., Inc. v. Coushatta Tribe of La., 992 So. 2d 446, 449 (La. 2008), *cert. denied*, 129 S. Ct. 1908 (2009). In its petition in opposition of certiorari to the U.S. Supreme Court, Meyer and Associates, Inc. argued that the court's decision in *Meyer* did not definitively foreclose the Doctrine's application in state court. Brief in Opposition, *Meyer*, 992 So. 2d 446 (No. 08-985), 2009 WL 599619. Given the court's characterization of the Doctrine's effects, *see supra* note 56 and accompanying text, it appears unlikely that a district court in Louisiana would apply the Doctrine from this point onward.

weighing in favor of the Doctrine's application should have compelled the Louisiana Supreme Court to reach a different conclusion.

A. Allowing Tribal Courts to Apply Their Own Law Promotes the Core Federal Goals of Tribal Sovereignty and Self-Determination

Native American tribes are immune from suit in state courts unless they have waived their sovereign immunity.[114] Therefore, the ultimate question of jurisdiction in cases such as *Meyer* rests on a determination of whether the Tribe has waived its sovereign immunity. The determination of tribal sovereignty will, in most cases, be a question of tribal law. As stated in *Iowa*, "[p]romotion of tribal self-government . . . require[s] that the tribal court have 'the first opportunity to evaluate the factual and legal bases for the challenge' [of] jurisdiction."[115] Thus, Native American tribal courts should be given the opportunity to determine their own jurisdiction, and not, as the Louisiana Supreme Court held in *Meyer*,[116] nontribal courts.

One of the most compelling reasons why a nontribal court should not apply and interpret tribal law is, quite simply, because tribal law is *different*.[117] This was apparently on the minds of the Supreme Court justices in *National*; the Court stated that the Doctrine "will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review."[118] This is because of the simple fact that the application of tribal law is not well-suited to the adjudicatory system practiced in state and federal courts.[119]

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114. *See generally* Bonnette v. Tunica-Biloxi Indians, 873 So. 2d 1 (La. Ct. App. 3d 2003).

115. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 16 (1987) (quoting Nat'l Farmers Union Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856 (1985)).

116. *Meyer*, 992 So. 2d at 450–52. Here, the court interpreted section 1.1.05 of the Coushatta Tribal Code and determined that, under the Tribe's law, a waiver of sovereign immunity had occurred.

117. *See* Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts (Part II of II)*, 46 AM. J. COMP. L. 509, 562 (1998).

118. *National*, 471 U.S. at 857.

119. John J. Harte, *Validity of a State Court's Exercise of Concurrent Jurisdiction over Civil Actions Arising in Indian Country: Application of the Indian Abstention Doctrine in State Court*, 21 AM. INDIAN L. REV. 63, 80 (1997).

1. Native American Culture and Its Influence on Native American Law

Law is a product of the cultural processes of a people and is part of their culture.[120] Furthermore, the processes relating to the application of law reflect the culture in which those processes exist.[121] Accordingly, Native American culture has influenced Native American laws, and for a nontribal court to interpret tribal law in order to determine a question of jurisdiction is an affront to tribal sovereignty.[122]

Some commentators have denied that Native American culture has influenced tribal law because many tribal codes are modified versions of model codes promulgated by the Bureau of Indian Affairs.[123] However, this certainly does not foreclose the ability of Native American culture to have an effect on the law and its application. One scholar observed that "custom is the 'underground law' of the [tribal] courts, in the sense that it affects many decisions without being explicitly recognized or systematized in writing."[124] Further, tribal courts do allow social norms to influence their decision-making process, and those norms are reflected in a body of Native American common law.[125]

An examination of Cherokee tribal courts illustrates the effect that culture has on tribal law.[126] Although codes bearing resemblance to those found in typical American courts had been introduced, "[t]raditional Cherokee thought on laws and legal

120. *See* Alan Watson, *Legal Change: Sources of Law and Legal Culture*, 131 U. PA. L. REV. 1121, 1152 (1983); *see also* ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 2 (2000) ("But life in the law is not lived in a vacuum. It is part of a pervasive world of *culture*. If law is to work for the people in a society, it must be (and must be seen to be) an extension or reflection of their culture.").

121. *See* OSCAR G. CHASE, LAW, CULTURE, AND RITUAL 2 (2005).

122. *See generally* Cooter & Fikentscher, *supra* note 12.

123. *See* SAMUEL J. BRAKEL, AMERICAN INDIAN TRIBAL COURTS AND THE COST OF SEPARATE JUSTICE 17 (1978).

124. Cooter & Fikentscher, *supra* note 117, at 563; *see also* Frank Pommersheim & Sherman Marshall, *Liberation, Dreams, and Hard Work: An Essay on Tribal Court Jurisprudence*, 1992 WIS. L. REV. 411, 429–34.

125. Cooter & Fikentscher, *supra* note 12, at 294. Cooter interviewed several tribal court judges and ultimately came to the conclusion that those persons enforcing tribal law refine precedent and also draw upon tribal custom to assist in the decision making process.

126. Although, obviously, the Cherokee are a different tribe from the Coushatta Tribe of Louisiana, it is important to illustrate the fact that tribal courts can be—and in several instances are—influenced by their particular tribe's culture.

institutions survived long after the adoption of written codes."[127] Most of this came from the fact that written tribal laws were incomplete and thus needed to be supplemented.[128] The gaps that remained were sometimes filled with tribal customs.[129] In many respects, the ancient Cherokee manner of enforcing laws lived on past Anglo-American adaptations to their legal system.[130] Given that tribal culture can—and sometimes does—influence tribal decision making, a nontribal court is not qualified to apply tribal law.

Yet in *Meyer*, the Louisiana Supreme Court took it upon itself to interpret a provision of the Coushatta Tribal Code.[131] Specifically, the court applied the following language from section 1.1.05 of the Coushatta Tribal Code:

> The Coushatta Tribe of Louisiana, as a sovereign government, is absolutely immune from suit, and its Tribal Counsel, judges, Appellate Judges, ad-hoc Judges, officers, agents, and employees shall be immune from any civil or criminal liability arising or alleged to arise from their performance or non-performance of their official duties. *Nothing in this Code shall be deemed to constitute a waiver of the sovereign immunity of the Coushatta Tribe of Louisiana* except as expressly provided herein or as specifically waived by a resolution or ordinance approved by the Tribal Counsel specifically referring to such.[132]

The majority interpreted the "nothing in this Code" language literally to mean only that the Code itself cannot waive tribal immunity.[133] It then went on to draw the negative inference that a waiver outside of the confines of the Code, such as the Tribal Resolution given to Chairman Poncho, could potentially waive the tribe's sovereignty.[134] The *Meyer* court applied this interpretation despite the fact that the tribal council had never explicitly authorized the waiver of immunity but rather had generally granted

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127. RENNARD STRICKLAND, FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT 183 (1975).

128. *Id.* at 187–88.

129. *Id.* at 187.

130. *Id.* at 188.

131. Meyer & Assocs., Inc. v. Coushatta Tribe of La., 992 So. 2d 446, 450–51 (La. 2008), *cert. denied*, 129 S. Ct. 1908 (2009).

132. *Id.* at 450–51 (emphasis added) (citing title 1, section 1.1.05 of the Coushatta Tribal Code).

133. *Id.* at 451 ("[The words] 'nothing in this Code' mak[e] clear that the codal article applies only to the language of the Code, and not to waivers extraneous to the Code.").

134. *Id.*

negotiating authority to Chairman Poncho.[135] The court also failed to address Coushatta's reliance on tribal court jurisprudence, which interprets this provision of the Coushatta Tribal Code differently than the court did in *Meyer*.[136] As suggested by the Tribe, tribal court jurisprudence indicates that a waiver of the sort alleged by the plaintiff may not have been possible under tribal law.[137] Ultimately, the fact that there is a possibility that the tribal court would have reached a different conclusion serves as a further indication that the tribal court *should* have had the first opportunity to decide whether tribal sovereign immunity had been waived.

B. The Doctrine's Application Is Similar to, and Should Be Treated like, the Exhaustion of Administrative Remedies Doctrine

The Louisiana Supreme Court declined to apply the Tribal Exhaustion Doctrine because it felt the prudential considerations underlying the Doctrine's creation allowed its application to be discretionary.[138] However, Louisiana courts already apply a similar Doctrine, the Exhaustion of Administrative Remedies Doctrine.[139] These doctrines are strikingly analogous, and a useful parallel may be drawn between them. Because of this similarity, the Tribal Exhaustion Doctrine and its application should also be required of Louisiana courts in a manner that resembles the application of the Exhaustion of Administrative Remedies Doctrine.

The Exhaustion of Administrative Remedies Doctrine requires that all available avenues of administrative relief be exhausted before a party is able to obtain judicial review of an action of an administrative agency.[140] If a person feels as though administrative actions may cause him or her future harm, district courts will not provide relief until all legal remedies that are available within the agency have been exhausted.[141] The goal of the Doctrine of Exhaustion of Administrative Remedies is to avoid premature claims and also to give reviewing courts the benefit of the agency's

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135. *Id.* at 448.

136. The Tribe asserted that, in *Celestine v. Coushatta Tribe of Louisiana*, the tribal court held that, absent proper authorization, a waiver could not be effectuated unless it is authorized directly by the Tribal Council. Petition for a Writ of Certiorari, *supra* note 44.

137. *Id.*

138. *Meyer*, 992 So. 2d at 451.

139. Jackson v. Mayo, 975 So. 2d 815 (La. Ct. App. 2d 2008) ("A party must generally exhaust his administrative remedy before he can seek relief by suit.").

140. *See* William Funk, *Exhaustion of Administrative Remedies—New Dimensions Since* Darby, 18 PACE ENVTL. L. REV. 1, 1 (2000).

141. STEPHEN J. CANN, ADMINISTRATIVE LAW 116–17 (2d ed. 1998).

expertise, the idea being that the prescribed administrative agency will be better equipped to resolve the issue.[142]

The Exhaustion of Administrative Remedies Doctrine, like the Tribal Exhaustion Doctrine, is founded upon strong prudential considerations.[143] The prudential factors that support the Exhaustion of Administrative Remedies Doctrine's existence are, as classically stated by the U.S. Supreme Court:

> First, and most important, the legislature creates an agency for the purpose of applying a statutory scheme to particular factual situations. The exhaustion doctrine permits the agency to perform this function, including in particular the opportunity for the agency to find facts, to apply its expertise, and to exercise the discretion granted it by the legislature. Second, it is more efficient to permit the administrative process to proceed uninterrupted and to subject the results of the process to judicial review only at the conclusion of the process than to permit judicial intervention at each phase of the process. Third, agencies are not part of the Judicial Branch; they are autonomous entities created by the legislature to perform a particular function. *The exhaustion doctrine protects that agency autonomy.* Fourth, judicial review of agency action can be hindered by failure to exhaust administrative remedies because the agency may not have an adequate opportunity to assemble and to analyze relevant facts and to explain the basis for its action. Fifth, the exhaustion requirement reduces court appeals by providing the agency additional opportunities to correct its prior errors. Sixth, allowing some parties to obtain court review without first exhausting administrative remedies may reduce the agency's effectiveness by encouraging others to circumvent its procedures and by rendering the agency's enforcement efforts more complicated and more expensive.[144]

When compared with the prudential reasons supporting the application of the Tribal Exhaustion Doctrine laid out by the

142. JERRY L. MASHAW ET AL., ADMINISTRATIVE LAW, THE AMERICAN PUBLIC LAW SYSTEM 880 (3d ed. 1992).

143. *See* Gonzales v. Dep't of Homeland Sec., 508 F.3d 1227, 1233–34 (9th Cir. 2007) (referring to prudential concerns and the application of the doctrine).

144. 2 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 15.2, at 309 (3d ed. 1994) (emphasis added) (citing McKart v. United States, 395 U.S. 185, 193–95 (1969)).

Supreme Court in *National*,[145] the similarities between the doctrines become readily apparent. Each doctrine recognizes that another judicial institution's expertise is not only essential to gathering the facts necessary for an adequate disposition of the case at hand but also in applying the law to certain types of disputes.[146] Each recognizes that there is a potential for jurisdictional nightmares in having judicial intervention at multiple steps in the process.[147] Each doctrine exists in order to protect the autonomy of another judicial body.[148] Each also places emphasis on the importance of the subservient judicial body's ability to explain the bases for a decision.[149] Lastly, each doctrine exists out of recognition that a district court's premature decision of a case could reduce the other judicial body's effectiveness.[150] The prudential concerns that exist to support the Tribal Exhaustion Doctrine are clearly similar to those that support the Exhaustion of Administrative Remedies Doctrine. As such, the doctrines should be applied in similar fashion.[151]

Courts apply the Exhaustion of Administrative Remedies Doctrine because they consider administrative agencies as experts in their particular field. It is, therefore, important to illustrate how tribal courts are experts in answering questions related to their own jurisdiction. The determination of whether tribal courts will have jurisdiction requires the balancing of factors related to tribal self-determination and tribal sovereignty.[152] Tribal courts regularly handle these questions,[153] and as a result, they have the most expertise in determining whether control over certain activities on tribal lands is essential to tribal self-government.[154] Further, the tribal courts have actually developed their own doctrine of

145. Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856–57 (1985).

146. *Id.* at 857; 2 DAVIS & PIERCE, *supra* note 144, § 15.2.

147. *National*, 471 U.S. at 857; 2 DAVIS & PIERCE, *supra* note 144, § 15.2.

148. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 15 (1987); 2 DAVIS & PIERCE, *supra* note 144, § 15.2.

149. *National*, 471 U.S. at 857; *see also* 2 DAVIS & PIERCE, *supra* note 144, § 15.2.

150. *Iowa*, 480 U.S. at 15; *see also* 2 DAVIS & PIERCE, *supra* note 144, § 15.2.

151. Alex Tallchief Skibine, *Deference Owed Tribal Courts' Jurisdictional Determinations: Towards Co-Existence, Understanding, and Respect Between Different Cultural and Judicial Norms*, 24 N.M. L. REV. 191, 195 (1994).

152. *See supra* notes 106–07 and accompanying text.

153. *See* Frank Pommersheim, *The Contextual Legitimacy of Adjudication in Tribal Courts and the Role of the Tribal Bar as an Interpretive Community: An Essay*, 18 N.M. L. REV. 49 (1988).

154. Skibine, *supra* note 151, at 222.

sovereign immunity under tribal law.[155] Given that tribal courts are essentially experts with respect to these issues, it becomes apparent that questions of jurisdiction, such as those found in *Meyer*, should be addressed by the tribal courts because they are the judicial institutions that are most qualified to answer these questions.

C. Louisiana State Policies Regarding Native American Tribes Also Indicate That the Doctrine Should Have Been Required

In reaching its decisions in *National* and in *Iowa*, the U.S. Supreme Court based its holdings on the existence of a strong federal policy in favor of tribal sovereignty, self-determination, and self-government.[156] Although there is not much room for state legislation with respect to Native Americans because Congress retains plenary power over the tribes,[157] there are a few areas in which Louisiana has passed legislation governing interactions with Native American tribes.[158] Within these statutes, there appears to be some basis to conclude that Louisiana's policy is to promote those same goals that the federal government wishes to promote. A few statutes directly require that Native American tribes be treated as though they are sister states.[159] Much more directly, however, one statute says that "[i]t is the policy of this state to acknowledge the tribes within the borders of the state, to support their aspirations for the preservation of their cultural heritage and the

155. Rave v. Reynolds, 23 Indian L. Rep. 6150, 6161 (Winnebago Tribe of Neb. Sup. Ct. 1996).

156. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 14 (1987) ("We have repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government."); Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856 (1985) ("Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination.").

157. United States v. Wheeler, 435 U.S. 313, 319 (1978) ("Congress has plenary authority to legislate for the Indian tribes in all matters, including their form of government.").

158. *See, e.g.*, LA. REV. STAT. ANN. § 8:681 (Supp. 2011) (instructing agencies on how to proceed when an unmarked grave contains a person of Native American descent); *id.* § 13:1804(B) (denoting how Native American tribes are to be treated for purposes of the Uniform Child Custody Jurisdiction and Enforcement Act); *id.* § 1852(8) (denoting how Native American tribes are to be treated for purposes of the Uniform International Child Abduction Prevention Act); *id.* § 15:1423 (2005) (defining Native Americans as a minority for purposes of the Juvenile Delinquency and Gang Prevention Act of 1993).

159. *Id.* § 13:1804(B) (Supp. 2011) ("A court of this state shall treat a tribe as if it were a state of the United States for the purpose of applying Subparts A and B of this Part."); *id.* § 1852(8) ("State means a state of the United States .... The term includes a federally recognized Indian tribe or nation.").

improvement of their economic conditions, and to assist them in achieving their just rights."[160] Moreover, a bill introduced in the Louisiana Legislature in 2009 says that Louisiana's Office of Indian Affairs "[a]ssists Louisiana American Indians in receiving education, realizing self-determination, improving the quality of life, and developing a mutual relationship between the state and the Tribes."[161] It also appears that the Louisiana Legislature is considering passing a law that would grant recognition of full faith and comity to the judgments of Native American tribal courts, and it has directed the Louisiana State Law Institute to study the potential effects of such a law.[162] Therefore, it appears that Louisiana's policy regarding Native Americans also echoes that of the federal government.

Because Native American tribes are immune from suit unless they have waived their sovereign immunity[163] and the question of waiver is ultimately one of tribal law, tribal courts are entitled to answer that very question. Because tribal law is different from typical American law, district courts are ill equipped to apply tribal law. Further, given that tribal courts are experts at determining questions of tribal sovereign immunity and jurisdiction, deference should be given to that expertise in much the same way that administrative agencies are treated under the Exhaustion of Administrative Remedies Doctrine. Such a result would not only further the policies of the federal government, but would further Louisiana's policies as well.

D. The Other Side of the Coin: A Contemplation of Policy Considerations Against Exhaustion

One unfortunate side effect of the application of the Tribal Exhaustion Doctrine is that requiring the tribal court to determine whether it has jurisdiction may delay the ultimate resolution of a litigant's claim. Although in a vacuum this may seem like an unjustifiable run-around, a comparison to the effects of the exhaustion of administrative remedies doctrine shows that, in reality, the application of the Tribal Exhaustion Doctrine is far less egregious.

One commentator characterized a potential scenario in which a litigant must exhaust all available administrative remedies in order

160. *Id.* § 49:158.1(2) (2003).
161. H.B. 1, 2009 Leg., Reg. Sess. (La. 2009).
162. S. Con. Res. 125, 2006 Leg., Reg. Sess. (La. 2006).
163. *See generally* Bonnette v. Tunica-Biloxi Indians, 873 So. 2d 1 (La. Ct. App. 3d 2003).

to receive judicial relief from an adverse decision from an administrative agency:

> First, the person appeals the initial denial decision to the supervisor of the clerk who processed the application and determined that it did not qualify for the benefit (or tax exemption). Most often, the supervisor will support the position of the clerk. Next, an appeal can be made to the supervisor's supervisor, who most likely will be the director of the local office. If the person loses that appeal, he or she must appeal the decision to the local director to the regional office. If the decision from the regional office is still adverse, some agencies require (allow) an appeal to the head of the agency for a final agency decision, which can then (and only then) be challenged in the courts. That is *exhaustion*, and under normal circumstances a federal court will simply not entertain a suit by a plaintiff who has not exhausted all avenues of appeal available within the agency.[164]

By comparison, the Tribal Exhaustion Doctrine, even held against the negative characterization used by the court in *Meyer*,[165] would appear to be far less burdensome on a litigant's claim.

Another potential concern is that a litigant's case could be taken out of a state's court and placed into the tribal court, a potentially unfamiliar and unexpected venue. Although the fear of being "home-towned" is certainly a valid one, the U.S. Supreme Court in *Iowa* rejected this argument.[166] This rejection makes sense in light of the fact that a litigant whose claim has been subjected to the exhaustion requirement will have a right to review in federal district court once all of the remedies have been exhausted.[167]

Although it is apparent that the application of the Tribal Exhaustion Doctrine will, in some instances, result in delay and expense to a litigant, these concerns are outweighed by the policy considerations made in favor of its application.[168] Requiring the Doctrine in Louisiana's courts would therefore serve the best interests of the state as well as those of the Native American tribes within its borders.

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164. CANN, *supra* note 141, at 117.

165. *See supra* note 56 and accompanying text.

166. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18–19 (1987) ("Petitioner also contends that the policies underlying the grant of diversity jurisidiction . . . justify the exercise of federal jurisdiction in this case. We have rejected similar attacks on tribal court jurisdiction in the past. . . . The alleged incompetence of tribal courts is not among the exceptions to the exhaustion requirement.").

167. *Id.* at 19.

168. *See* discussion *supra* Part IV.A–C.

CONCLUSION

Regardless of whether the decision to do so is based on a substantive requirement or prudential considerations in favor of tribal sovereignty and self-determination, the Louisiana Supreme Court erred by not requiring the application of the Tribal Exhaustion Doctrine in Louisiana's district courts. Given that tribal culture and experience is different from that found in American societies, conflicts in the creation, application, and enforcement of laws are bound to arise between tribes and federal or state institutions.[169] However, an essential component of maintaining and promoting tribal sovereignty is an acceptance of these differences.[170] Therefore, in recognition of these differences and out of respect to these "domestic dependent nations," Louisiana courts should be required to defer to tribal courts for determinations of their own jurisdiction.

Carey Austin Holliday[*]

169. *See* Pommersheim & Marshall, *supra* note 124, at 421.

170. *See id.* at 420 ("Tribal courts do not exist solely to reproduce or replicate the dominant canon appearing in state and federal courts. If they did, the process of colonization would be complete and the unique legal cultures of the tribes fully extirpated.").

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